SUBJECT INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI 1

Summary Statement of the Matter Involved 2

Reasons Relied on for the Allowance of the Writ 5

Prayer for Writ 6

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI 7

I. The Opinion of the Courts Below 7

II. Jurisdiction 8

III. Statement of the Case 9

IV. Specification of Errors 9

V. Argument 10

Point A. The Decision Below is Contrary to and in Conflict with the Decision of this Court in Illinois Surety Company *v.* United States to the use of J. A. Peeler, *et al*, 240 U. S. 214 11

Point B. The Decision Below is in Conflict with Consolidated Indemnity and Insurance Company *v.* W. A. Smoot & Co., Inc., 57 F. (2d) 995 (C. C. A. 4th 1932), Certiorari Denied 287 U. S. 613 15

TABLE OF CASES CITED.

American Bonding Co., *et al v.* United States to the use of Francini, *et al*, 233 F. 364 19

Antrim Lumber Co. *v.* Hannan *et al*, 18 F. (2d) 548 (C. C. A. 8th) .. 18

Arnold *et al v.* U. S. to use of W. B. Guimarin & Co., 280 F. 338 (C. C. A. 4th) 18

Consolidated Indemnity Insurance Co. *v.* W. A. Smoot & Co., Inc. 57 F. (2d) 995, Certiorari denied 287 U. S. 613 ..... 10, 15

Illinois Surety Co. *v.* United States to the use of J. A. Peeler, *et al*, 240 U. S. 214 ..... 9, 10, 11, 17

Lambert Lumber Co. *v.* Jones Engineering & Construction Company, Inc., 42 F. (2d) 74, Certiorari Denied 283 U. S. 842 ..... 14, 17

Mandel, *et al v.* U. S. to use of Wharton & W. R. Co., *et al*, 4 F. (2d) .. 19

PAGE

Robinson, *et al v.* U. S. to use of Brown Ketcham Iron Works, *et al*, 251 F. 461 (C. C. A. 2nd) 18

Southern Surety Co. *v.* Western Pipe & Steel Co. of California, 16 F (2d) 457 (C. C. A. 9th) 18

U. S. to use of Crellin, *et al v.* George F. Pawling & Co., *et al*, 297 F. 65 .. 19

U. S. to use of R. Haas Electric & Mfg. Co., *et al v.* Title Guaranty and Surety Co., *et al*, 254 F. 958 (C. C. A. 7th) 18

U. S. to use of Stallings, *et al v.* Starr, *et al*, 20 F (2d) 803 18

U. S. to use of Union Gas Engine Co. *v.* Newport Shipbuilding Corporation, *et al*, 18 F (2d) 556 (C. C. A. 4th) 18

U. S. F. & G. Co. *v.* McNulty Bros. Inc. *et al*, 13 F (2d) 78 (C. C. A. 1st) 18

U. S. F. & G. Co. *v.* U. S. to use of Price *et al*, (not reported) (C. C. A. 9th, June 5, 1933) 18

U. S. F. & G. Co. *v.* U. S. to use of Smoot (Court of Appeals of D. C.) 298 F 365 18

TABLE OF STATUTES CITED.

R. S. Sec. 236 (Comp. Stat. 1913, Sec. 368) 13

Budget and Accounting Act of June 10, 1921, 42 Stat. at L. 24, 31, U. S. C. Sec. 71 ..... 5, 10, 14, 16, 18

"Hurd Act"—Act of August 13, 1894, 28 Stat. at L. 278, Chap. 280, 40 U. S. C. Sec. 270, as Amended 2, 5, 8

Judicial Code, Sec. 240a, as amended by Act of February 13, 1925, 43 Stat. at L. 938, 28 U. S. C. Sec. 347 ..... 8, 9

In the Supreme Court of the United States.

OCTOBER TERM, 1933. No.

Globe Indemnity Company, Petitioner,

v.

The United States of America, to the use of Steacy-Schmidt Manufacturing Company, Incorporated.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the Globe Indemnity Company respectfully shows to your Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a suit on a bond given under the "Hurd Act" (Act of August 13, 1894, 28 Stat. at L. 278, Chap. 280, as amended by the Act of February 24, 1905, 33 Stat. at L. 811, Chap. 778, and the Act of March 3, 1911, 36 Stat. at L. 1167, Chap. 231, Sec. 291, 40 U. S. C. Sec. 270) which requires contractors for government construction to provide bonds conditioned upon the satisfactory performance of the construction contract and the payment of laborers and materialmen. The Bond (R. 25-29) is in the prescribed form and runs to the United States as obligee. The respondent is an unpaid materialman who brought this suit in the name of the United States and the petitioner is the surety upon the bond on which The Sanitation Corporation (the contractor) was the principal.

The Hurd Act provides:

> "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and material shall * * *

> have a right of action * * * provided that * * * it * * * shall be commenced within one year after the performance and final settlement of said contract, and not later."

The present suit was brought on October 17, 1928 (R. 1) and the defense was that because final settlement had occurred prior to October 17, 1927, the suit was not brought within one year after final settlement and was therefore brought too late (R. 10, 11).

There is no dispute as to any fact bearing upon the date of final settlement of the contract. The contract was for materials for use in the Umatilla (McKay Dam) irrigation project and was made for the United States by the Department of the Interior (R. 23-25).

By letter dated June 16, 1927, the First Assistant Secretary of the Department of the Interior forwarded the claim of The Sanitation Corporation, the contractor, to the General Accounting Office for direct settlement, in which letter he states "The claim has received administrative examination, is approved for $8,899.30 and I recommend that the amount found due be paid from the Reclamation Fund-4X502" (R. 38).

On October 26, 1927, the General Accounting Office issued its formal certificate of settlement (R. 38-41) and the amount found due by the Department of the Interior was paid on November 5, 1927 (R. 41).

The question involved is whether "performance and final settlement" of the contract between The Sanitation Corporation and the United States took place on June 16, 1927, when the First Assistant Secretary of the Department of the Interior approved the claim and recommended payment or on October 26, 1927, when the General Accounting Office issued its certificate of settlement.

The United States District Court for the Eastern District of Pennsylvania, in an opinion by Kirkpatrick, *J.* (R. 54-61), held that performance and final settlement took place on June 16, 1927, and that this suit, which was commenced on October 17, 1928, was brought too late. The Circuit Court of Appeals for the Third Circuit reversed the judgment of the District Court and held (R. 72) that performance and final settlement took place on October 26, 1927, and that this suit was brought within one year from the date of performance and final settlement. Circuit Judge Woolley dissented from this view and concurred with the District Court (R. 74-75).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals of the Third Circuit held that performance and final settlement took place not on June 16, 1927, when the claim was examined and approved by the Administrative Department having charge of the work, but on October 26, 1927, when the General Accounting Office issued its certificate and that, therefore, the present suit had been commenced within one year after the performance and final settlement of the contract, as required by the "Hurd Act" (Act of August 13, 1894, as amended, 40 U. S. C. Sec. 270). The Circuit Court of Appeals for the Third Circuit in so holding has decided an important question of federal law in a way in conflict with the applicable decisions of this Honorable Court.

2. The Circuit Court of Appeals for the Third Circuit erroneously held that the date of performance and final settlement was determined by the date upon which proceedings under the Budget and Accounting Act of 1921 (42 Stat. at L. 24, 31 U. S. C. Sec. 71) took place. In so holding, the Circuit Court of Appeals for the Third Circuit created a conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit.

C.

PRAYER FOR WRIT.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 5025, October Term, 1932, The United States of America, to the use of Steacy-Schmidt Manufacturing Company, Incorporated, *v.* Globe Indemnity Company, and that said judgment of the Circuit Court of Appeals for the Third Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

GLOBE INDEMNITY COMPANY,
By
FREDERIC L. BALLARD,
1035 Land Title Bldg.,
Philadelphia, Pa.,
Attorney for Petitioner.

In the Supreme Court of the United States.

OCTOBER TERM, 1933. No.

Globe Indemnity Company, Petitioner,

v.

The United States of America, to the use of Steacy-Schmidt Manufacturing Company, Incorporated.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 54-61), filed July 15, 1932, is not reported. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 70-74), filed July 10, 1933, is not reported.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240a of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. at L. 938, 28 U. S. C. Section 347.

2. The date of the judgment to be reviewed, namely, the judgment of the Circuit Court of Appeals for the Third Circuit, is July 10, 1933.

3. This case involves the interpretation of the Act of Congress approved August 13, 1894, 28 Stat. at L. 278, Chap. 280, as amended, 40 U. S. C. Sec. 270, known as the "Hurd Act." Said statute allows persons supplying labor or material to contractors upon public buildings or works to bring suit upon the contractor's bond provided that such suit be commenced "within one year after the performance and final settlement of said contract, and not later."

4. The Circuit Court of Appeals for the Third Circuit held that performance and final settlement took place on the date on which the General Accounting Office issued its certificate and not upon the date upon which the Administrative Department having charge of the work approved

the work and the amount to be paid to the contractor.

5. The case is therefore one which prior to the Act of February 13, 1925, 43 Stat. at L. 938, would have been reviewable by your Honorable Court upon writ of error. *Illinois Surety Co.* v. *United States to the use of J. A. Peeler, et al,* 240 U. S. 214. The case is now reviewable by your Honorable Court upon writ of certiorari pursuant to Section 240a of the Judicial Code as aforesaid.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under the heading "A" in the petition for *certiorari* and in the interest of brevity the statement is not repeated at this point.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the United States District Court for the Eastern District of Pennsylvania.

2. The Circuit Court of Appeals for the Third Circuit erred in holding that the date of performance and final settlement was the date upon which the General Accounting Office issued its certificate and not the date upon which the Department of the Interior approved the claim of the contractor for payment.

3. The Circuit Court of Appeals for the Third Circuit erred in holding that the date of performance and final settlement was determined by the proceedings taking place under the Budget and Accounting Act of 1921 (42 Stat. at L. 24, 31 U. S. C. Sec. 71).

4. The Circuit Court of Appeals for the Third Circuit erred in holding that the present suit was brought within one year after performance and final settlement of the contract.

V.

ARGUMENT.

POINT A. The decision below is contrary to and in conflict with the decision of this court in *Illinois Surety Company* v. *United States to the use of J. A. Peeler, et al,* 240 U. S. 214.

POINT B. The decision below is in conflict with *Consolidated Indemnity & Insurance Co.* v. *W. A. Smoot & Co., Inc.,* 57 F (2d) 995 (C. C. A. 4th, 1932), certiorari denied 287 U. S. 613.

Point A. The decision below is contrary to and in conflict with the decision of this court in Illinois Surety Company v. United States to the use of J. A. Peeler, et al, 240 U. S. 214.

In *Illinois Surety Company* v. *United States to the use of J. A. Peeler, et al,* 240 U. S. 214, (known as the Peeler case) it appears that the work under the contract was completed and on August 21, 1912, the Treasury Department, which was the Department in charge of the construction, "stated and determined the final balance" to be paid to the contractor. Payment was made on September 11, 1912, and suit was brought on March 4, 1913. Both of the courts below entered judgment in favor of the plaintiff and the surety brought the case to this court upon writ of error on the theory that performance and final settlement took place September 11, 1912, and consequently that the suit was brought within six months of the date of performance and final settlement and was therefore premature. This court held that performance and final settlement took place on August 21, 1912, the date on which the Treasury Department, which was the Department in charge of the construction of the building, stated and determined the final balance due to the contractor. Consequently, the suit was not brought within six months of per-

formance and final settlement and was not premature. At page 221, Mr. Justice Hughes said:

> "* * * it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well-defined meaning as denoting *the appropriate administrative determination* with respect to the amount due. We think that the words 'final settlement' in the act of 1905 had reference to the time of this determination when, so far as the government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority. It is manifestly of the utmost importance that there should be no uncertainty in the time from which the six months' period runs. The time of the final administrative determination of the amount due is a definite time, fixed by public record and readily ascertained." (Italics ours.)

Applying this test to the case under consideration this court found that performance and final settlement took place on the date on which the Administrative Department having charge of the work approved the balance due to the contractor, saying, at page 222:

> "On August 21, 1912, the supervising architect having received the certificate of the chief

> of the technical division of the office that all work embraced in the contract had been satisfactorily completed, made his statement of the amount finally due, recommending that only the actual damage (as stated) be charged against the contractor, and that the proper voucher should be issued in favor of the contractor for the balance, to wit, $3,999.01. And, on the same date, this recommendation was approved and actual damages charged accordingly by direction of the Secretary of the Treasury. This, in our judgment, was the 'final settlement' of the contract within the meaning of the act."

In the *Peeler* case this court considered R. S. Sec. 236 (Comp. Stat. 1913, Sec. 368) which provided that "all claims and demands whatever, by the United States or against them, and all accounts whatever, in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Treasury Department." In holding that performance and final settlement took place when the Administrative Officers having charge of the work approved the amount due the contractor, this court necessarily held that the date of performance and final settlement was not determined by proceedings under R. S., Sec. 236.

The Circut Court of Appeals for the Third Circuit in the present case relied upon the

Budget and Accounting Act of 1921 (42 Stat. at L. 24, 31 U. S. C. Sec. 71) which transfers the duty from the Treasury to the General Accounting Office, but otherwise is in substantially the same language as the previous statute (R. S. Sec. 236) which authorized the Treasury Department to settle and adjust claims by or against the United States. In other words, the majority of the court below sustained an argument which was necessarily rejected in the *Peeler* case.

Judge Woolley, dissenting in the court below, recognized that the decision was inconsistent with the decision of this court in the *Peeler* case, saying: "adhering to the law of the Peeler case, I believe the Budget and Accounting Act of 1921 did not repeal or change the provisions of the Hurd Act requiring an appropriate administrative determination of a claim before suit."

The facts of the present case are very different from those of *Lambert Lumber Co.* v. *Jones Engineering and Construction Company, Inc.*, 47 F (2d) 74, certiorari denied 283 U. S. 842. In that case the Administrative Department having charge of the work merely passed along to the General Accounting Office the function of making final settlement. There never was any administrative determination of the amount due

except in the General Accounting Office. This distinction has been recognized in other Circuits. See *Consolidated Indemnity & Insurance Company* v. *W. A. Smoot & Co., Inc.*, 57 F (2d) 995, 997 (C. C. A. 4th, 1932), certiorari denied 287 U. S. 613. In the present case, the administrative department itself determined the amount due.

Judge Woolley, in his dissenting opinion in the court below is careful to point out that the court should have followed the decision and not the dictum in the *Lambert* case because, while that decision is perfectly correct, the dictum is inconsistent with the decision of this court in the *Peeler* case.

Point B. The decision below is in conflict with Consolidated Indemnity & Insurance Co. v. W. A. Smoot & Co., Inc., 57 F (2d) 995 (C. C. A. 4th, 1932), certiorari denied 287 U. S. 613.

The judgment of the Circuit Court of Appeals for the Third Circuit, which this court is asked to review, has created a conflict between the Third and Fourth Circuits on the question involved in this case.

In *Consolidated Indemnity and Insurance Company* v. *W. A. Smoot & Co., Inc.*, 57 F (2d) 995 (C. C. A. 4th 1932), certiorari denied 287 U. S.

613, the contract involved the construction of barracks at Fort Humphreys, Virginia. On June 28, 1930, the constructing quartermaster reached an agreement with the contractor upon the balance due and prepared a voucher for that amount. It was argued that no final settlement had ever taken place because there was no evidence of a settlement in the General Accounting Office as required by the Budget and Accounting Act of 1921. The Circuit Court of Appeals for the Fourth Circuit held that performance and final settlement within the meaning of the Hurd Act took place on June 28, 1930, when the constructing quartermaster, who represented the Administrative Department having charge of the work, fixed the amount due the contractor and the court rejected the argument that final settlement, if it was to take place at all, must take place in accordance with the Budget and Accounting Act, saying, at page 997:

> It is argued that there was no showing that there had ever been a final settlement within the meaning of the Hurd Act because there was no evidence of a settlement in the general accounting office, as required by the Budget and Accounting Act of 1921. Act June 10, 1921, § 305 (31 USCA § 71). We are not impressed by this argument. Undoubtedly, where the Comptroller General

actually makes the administrative determination of the amount due, as in Lambert Lumber Co. *v.* Jones Engineering & Construction Co. (C. C. A. 8th) 47 F, (2d) 74, his determination is the settlement within the meaning of the act. But in other cases laborers and materialmen are not to be delayed in the assertion of their claims against bonds of public contractors until the Comptroller General's office shall have completed the auditing of the accounts of the disbursing officers. We think that, when the government official charged with responsibility in the premises officially determines the balance due to or from the contractor and makes a record of such determination, this is a final settlement within the meaning of the Hurd Act, notwithstanding that the accounts of disbursing officers are subject to audit in the Comptroller General's office. Just as the fact that the right to sue on the bond is not delayed by the contingency that the determination of the officer may not be approved by the courts (Ill. Surety Co. *v.* United States, 240 U. S. 214, 221, 36 S. Ct. 321, 60 L. Ed. 609), so it is not to be delayed by the contingency that such determination may not be approved by the Comptroller General's Office in its auditing of the accounts. We regard the decision in Illinois Surety Co. *v.* United States, *supra,* as determinative of the matter. While it is

true that that case was decided before the passage of the Budget Act of 1921, accounts at that time were subject to revision in the Treasury Department under a statute of a wording very similar to that upon which the surety company relies. Rev. St. § 236."

It is clear, therefore, that the Circuit Court of Appeals for the Third Circuit, in the decision below, has made the date of performance and final settlement turn on what takes place in the General Accounting Office under the Budget and Accounting Act. In so doing, it not only failed to follow the decision of this court in the *Peeler* case but has placed itself out of harmony with other Circuits which, as far as we have been able to determine, have followed, without exception, the rule laid down by this court in the *Peeler* case almost 20 years ago.* Indeed, until

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* *U. S. F. & G. Co. v. McNulty Bros. Inc., et al,* 13 F (2d) 78 (C. C. A. 1st, 1926).

Robinson, et al v. U. S. to use of Brown, Ketcham Iron Works, et al, 251 F 461 (C. C. A. 2nd, 1918).

U. S. to use of Stallings, et al v. Slavs, et al, 20 F (2d) 803 (C. C. A. 4th, 1927).

U. S. to use of Union Gas Engine Co. v. Newport Shipbuilding Corporation, et al, 18 F (2d) 556 (C. C. A. 4th, 1927).

Arnold, et al v. U. S. to use of W. B. Guimarin & Co., 280 F 338 (C. C. A. 4th, 1922).

U. S. to use of R. Haas Electric & Mfg. Co., et al v. Title Guaranty and Surety Co., et al, 254 F 958 (C. C. A. 7th, 1918).

Antrim Lumber Co. v. Hannan, et al, 18 F (2d) 548 (C. C. A. 8th, 1927).

Southern Surety Co. v. Western Pipe & Steel Co. of California, 16 F (2d) 456 (C. C. A. 9th, 1926).

U. S. F. & G. Co. v. U. S. to use of Price, et al (not reported) (C. C. A. 9th, June 5, 1933).

U. S. F. & G. Co. v. U. S. to use of Smoot, 298 F 365 (Court of Appeals of D. C., 1924).

the decision of the present case the Circuit Court of Appeals for the Third Circuit has conformed to the decision of this court in the *Peeler* case.*

Respectfully submitted,

ROBERT BRIGHAM,
MORRIS CHESTON,
FREDERIC L. BALLARD.

BALLARD, SPAHR, ANDREWS & INGERSOLL,
Of Counsel.

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* *American Bonding Co. et al* v. *United States to the use of Francini, et al*, 233 F 364 (1916).
U. S. to use of Crellin, et al v. *George F. Pawling & Co., et al*, 297 F 65 (1924).
Mandel, et al v. *U. S. to use of Wharton & W. R. Co., et al*, 4 F (2d) 629 (1925).